90-975

No.: _____

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

MID-COUNTY MOTORS, INC.,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY M. MEYER, ESQ.
Attorney for Petitioner
150 Broadway - Suite 1212
New York, New York 10038
(212) 233-0011

DEPETRIS & MEYER, ESQS.
Of Counsel

QUESTION PRESENTED

1. Whether or not when a plea is taken on the basis of a misunderstanding of the extreme economic consequences of the plea, and the mistake is appreciated shortly after the taking of the plea and prior to sentence, it is an abuse of discretion to deny the defendant's application to withdraw the plea where the economic consequences of the plea are extreme and irreparable.

TABLE OF CONTENTS

	PAGE
Question Presented	-i-
Preliminary Statement	1-2
Jurisdiction	2
Statute Involved	2-3
Facts	4-13
Argument:	
POINT I: THE MOTION OF PETITIONER TO WITHDRAW ITS PLEA PRIOR TO SENTENCE SHOULD HAVE BEEN GRANTED. SUCH MOTIONS SHOULD BE LIBERALLY CONSTRUED	14-35
Conclusion	36
Order of the United States Court of Appeals for the Second Circuit, dated November 14, 1989	37-43

TABLE OF AUTHORITIES

	PAGE
American Standard Credit, Inc. v. Natural Cement Co., 643 F.2d 248 (11th Cir. 1981)	34
Barker v. United States, 579 F.2d 1219 (10th Cir. 1978)	
Boykin v. Alabama, 395 U.S. 238, 243-244 (1969)	17
Brady v. United States, 397 U.S. 742 (1970)	19
Bye v. United States, 435 F.2d 177 (2d Cir. 1970)	17
Duplex Co. v. Deering, 254 U.S. 443	15
Gates v. United States, 515 F.2d 73 (7th Cir. 1975)	17
Hecht v. Monaghan, 307 N.Y. 461 (1953)	15
In re Investors Funding Corp. of New York v. Securities Litigation, 523 F.Supp. 533, reh. denied, 576 F.Supp. 1350, reargument denied, 36 B.R. 1019 (D.C.N.Y. 1980)	34
Johnson v. Zerbst, 304 U.S. 458 (1938)	17

Table of Authorities (continued) PAGE

Katz v. Moss, 184 Misc. 133, Aff'd. 359 App. Div. 854 (Second Dept. 1944) 15

Kercheval v. United States, 274 U.S. 220 (1927) 17

Matter of Wignall v. Vletcher, 303 N.Y.435 15

Meredith v. Camp Hill Estates, Inc., 77 A.D. 2d 649 (N.Y.App.Div. 1980) 34

New York Penal Law, Section 20.20(2)(b) 33

North Carolina v. Alford, 400 U.S. 25 (1970) 19

O'Connor Associates v. Dean Witter Reynolds Inc., 529 F.Supp. 1179 (D.C.N.Y. 1981) 34

Truax v. Corrgian, 357 U.S. 312 15

United States v. Bradin, 535 F.2d 1039 (9th Cir. 1976) 21

United States v. Burnett, 671 F.2d 709 (2d Cir. 1982) 20

United States v. Campbell, 778 F.2d 764 (11th Cir. 1985) 21

Table of Authorities (continued) PAGE

United States v. Carden, 599 F.2d 1320, cert. denied, 444 U.S. 874 (4th Cir. 1979) 21

United States v. Casanova's Inc., 350 F.Supp. 388 (E.D. Wis. 1972) 28

United States v. Crowley, 529 F.2d 1055, 1072, cert. denied, 425 U.S. 995 (3rd Cir. 1976) 23,27

United States v. DeMauro, 581 F.2d 50 (2d Cir. 1978) 34

United States v. Figueroa, 575 F.2d, cert. denied, 474 U.S. 840 (2d Cir. 1985) 20

United States v. Gold, 743 F.2d 700, cert. denied, 459 U.S. 1217 (11th Cir. 1984) 34

United States v. Gonzalez, 820 F.2d 575 (2d. Cir. 1987) 18,20

United States v. Herman, 443 F.Supp. 625 (S.D.N.Y. 1977) 25,26, 27

United States v. Read, 534 F.2d 858 (9th Cir. 1977) 20

Table of Authorities (continued) PAGE

United States v. Roberts, 570 F.2d 989 (Appealed After Remand) 600 F.2d 815, Aff'd. 445 U.S. 552 (D.C. Cir. 1977) 22

United States v. Russell, 686 F.2d 35 (D.C. Cir. 1983) 21,22

United States v. Saft, 558 F.2d 1073 (2d Cir. 1977) 21

United States v. Teller, 762 F.2d 569, 575 (7th Cir. 1985) 19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No.

MID-COUNTY MOTORS, INC.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

This is an appeal by Petitioner, Mid-County Motors, Inc., from a judgment of the United States Court of Appeals for the Second Circuit decided November 14, 1989 in a five-page summary order, which affirmed

a judgment of the United States District Court for the Eastern District of New York (Hon. Charles P. Sifton), rendered on May 22, 1989, convicting Petitioner, Mid-County Motors, Inc., upon its plea of guilty, of fixing prices in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1 (1982). The Petitioner received a sentence to pay $380,000.00 in fines payable over a four year period.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. The opinion of the United States Court of Appeals for the Second Circuit is annexed hereto.

STATUTE INVOLVED

15 U.S.C., Section 1	Trusts, etc. in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render it illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preciding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

FACTS

Petitioner, Mid-County Motors, Inc., a franchise dealer of Buicks located in Brooklyn New York, was initially indicted for violation of the Sherman Antitrust Act along with three other Buick dealers and an officer of one of the other dealerships. The indictment in this case was voted after a very lengthy investigation by the Antitrust Division of the Department of Justice, which commenced with service of subpoenaes for certain books and records of the various corporate defendants, including Petitioner, approximately in 1986. After much discussion between counsel for Petitioner, counsel for the other defendants, and the Government, both before and after the indictment was voted, an agreement was reached by the Government and defense counsel which was embodied in a written plea agreement. On November 7, 1988, a plea was entered before Judge Sifton in the Eastern District of New York, and the

plea agreement was entered into the record (A40-64)*. All of the corporate defendants pleaded guilty and the plea agreement set forth specific fines for each corporate defendant. Upon acceptance of the plea agreement by the Court, the indictment was dismissed against the sole individual defendant, who was an officer of one of the corporations other than the Petitioner. The agreement provided that with respect to Mid-County Motors, Inc., an appropriate disposition would be a fine in the amount of $380,000.00, with quarterly payments to be made over four years in the amount of $23,750.00 each. Thereafter, the Petitioner made a motion to withdraw its plea of guilty, essentially on the grounds that during the course of plea negotiations between the Government and various counsel, inquiries were made by counsel for one of the defendants on behalf of all of the defendants with General

*References are to pages of Appendix in Court of Appeals for the Second Circuit

Motors to ascertain what action General Motors would take against the corporate defendants if a plea of guilty were entered. During the course of these discussions counsel for General Motors indicated in substance that there was not any automatic policy of termination of the various franchises as a result of a guilty plea, and also counsel for General Motors advised that he could not recall any instance of termination in connection with an alleged price fixing scheme. In addition, defense counsel was told that a determination as to what sanctions, if any, would be considered would depend on both business and legal reasons. Based upon these conversations, it was the opinion of counsel for all of the corporate defendants that their franchises would not be terminated after the guilty plea was entered. The President and sole stockholder of Mid-County Motors, Inc. authorized the entry of the guilty plea based upon his belief,

as well as the belief of counsel, that the franchise would not be terminated. That belief was not only based upon the discussions that had been had, but also was based upon a long-standing excellent relationship between Buick and Mid-County Motors, Inc., as well as the fact that the President and sole stockholder of Mid-County Motors, Inc., E. Stephen Malise, was not named as a defendant, was not named as an unindicted co-conspirator, and it was also based upon the fact that he never authorized or had any knowledge of any alleged scheme to fix prices (A31). Thus, the decision to enter the plea of guilty was based solely upon business and economic reasons, not the least of which was that the ability to stay in business would greatly affect income over the course of the future four years to allow Petitioner to pay the fine that would be imposed. Mr. Malise said that had he believed that the franchise would be terminated he never would have authorized the entry of

the plea, but Petitioner would have gone to trial (A 32). Also, Mr. Malise stated that, as far as he was concerned, Mid-County Motors, Inc. was not guilty.

On January 13, 1989, Petitioner was notified by Buick that its franchise would be terminated upon the acceptance of the plea by the Court and the imposition of sentence. Based upon that notification and prior to sentence Petitioner made not only a motion to withdraw its plea, but thereafter made a second motion asking the Court to reconsider the denial of the main motion.

It should also be pointed out that during the course of taking the plea, when the Court made its normal inquiries, it asked whether or not Mid-County Motors, Inc. understood that the entry of the plea of guilty could be utilized against it in other civil litigation (A 53-54). Defense counsel and Petitioner understood that that referred to the use of the plea in the class action lawsuits

which were then pending before the same Court. Because of the fact that Mr. Malise, the President of Mid-County Motors. Inc., was not a defendant, nor was he ever alleged to be a co-conspirator in the alleged scheme, it was not contemplated that the entry of the plea could cause termination of the franchise. In addition, it was pointed out in the motion to reargue that there was never an allegation that E. Stephen Malise, the President and sole stockholder of Petitioner, had any knowledge of the scheme or that he ever participated in the scheme. In fact, the sales manager of Petitioner, who was implicated in the scheme, said in substance that he never intended to agree to the price fixing scheme on behalf of Petitioner. Also, a further expectation on the part of Petitioner that the franchise would not be lost was that the franchise was not in the name of Petitioner but in the name of the President

and sole stockholder in his own name. It was also pointed out that there were manifest reasons for permitting the withdrawal of the plea, including the fact that the franchise could not be sold because it would now be worthless, in that any purchaser would know of the termination, that some fifty employees in a depressed area would lose their jobs, and that the affect on families in an already distressed economic area of Brooklyn made it economically and socially desirable that the continuance of the business and the maintenance of the value of the property be supported (A 37).

The President of Petitioner filed his own affidavit, tracing the history of Petitioner and indicating that he became the sole stockholder of the corporation after his father died and did not participate or have any knowledge of any alleged price fixing scheme, nor did he ever authorize anyone at the corporation to participate in such a

scheme. He specifically never authorized the sales manager to engage in such a scheme, and he attested to the fact that the pricing policy of Petitioner from its inception was based solely upon the economic circumstances that existed at the corporation. The profit margins were determined upon the net cost of the vehicle, taking into consideration fixed expenses and other economic factors, such as changing interest rates, rent factors, insurance costs and other items. He said that the policy had nothing to do with any alleged price fixing scheme with any other dealerships, and pointed out very significantly that Mid-County Motors' competition was really not from other Brooklyn Buick dealers, but rather other makes of vehicles that would be considered by customers to be competitive to the various models of Buick.

During the summer of 1988, when the plea was being considered. Mr. Malise said that he

was advised by his attorneys that counsel for one of the other dealerships had gone to Michigan to meet counsel for General Motors. Incidentally, there was no reason for all of the lawyers to go to that meeting, and it is not unusual for one attorney to confer with counsel for General Motors on behalf of everyone. Mr. Malise described the excellent relationship between his company and Buick, and that it had received numerous awards from Buick with regard to sales performance and customer satisfaction over the years, and because of the fact that Mr. Malise owned the franchise and he was never alleged to have done anything or to have any knowledge with regard to the price fixing scheme, nor had he been named as an unindicted co-conspirator, it was entirely reasonable that he could assume that his franchise would not be terminated automatically once the plea and sentence occurred. Mr. Malise further attested to the disastrous and irreparable

affect that would result once Petitioner lost its franchise.

The Government opposed both motions on the grounds that Rule 11 did not require the Court who took the plea to advise Petitioner of the economic consequence of the plea, which it contended was indirect.

The Court denied the first motion without opinion and simply indicated that it did not believe that this was a situation where there was a violation of Rule 11 and there was no fair and just reason for permitting the plea to be withdrawn. It also regarded the economic consequence as collateral (A 67). The motion to reconsider was denied with the comment that the Court saw no reason to depart from its earlier determination (A91).

The Court of Appeals for the Second Circuit affirmed in a short memorandum which held that the District Court had not abused its discretion.

POINT I

THE MOTION OF PETITIONER TO WITHDRAW ITS PLEA PRIOR TO SENTENCE SHOULD HAVE BEEN GRANTED. SUCH MOTIONS SHOULD BE LIBERALLY CONSTRUED.

It once was held that having a driver's license was a matter of privilege and that a State had the right to revoke a license for any reason it wanted to. Thereafter, the law developed to the point where it was recognized that a driver's license is no longer a privilege but that in today's day and age when a modern economy depends so much on people's ability to move around, having a driver's license carried with it certain rights. It was then decided that procedural safeguards followed an attempt by a State to revoke a license, that a license could not be revoked arbitrarily or capriciously, and that revocation is subject to review by the courts. This, of course, is true about licenses to practice

medicine, to practice chiropratic and to engage in other lawful professions. Hecht v. Monaghan, 307 N.Y. 461 (1953); Matter of Wignall v. Fletcher, 303 N.Y. 435; Duplex Co. v. Deering, 254 U.S. 443; Truax v. Corrigan, 357 U.S. 312; Katz v. Moss, 184 Misc. 133, aff'd. 359, App. Div. 854 (Second Dept. 1944)

It doesn't require a great deal of imagination to appreciate that if an attorney, for example, received a three year jail sentence but could continue to conduct his practice when he was again at liberty, that would be a less onerous penalty than if he were given a sentence of non-confinement but lost his right to practice his profession forever. It is, thus, clear that to say economic consequences are less important than other consequences when considering pleas and sentences is ludicrous. When one considers Rule 11 in terms of the idea that economic consequences of a plea many times have a much greater

impact than other consequences, then the idea that the withdrawal of pleas prior to sentence should be liberally construed makes good sense. It also makes sense in a case such as this where the economic affect of the plea is substantial and irreparable and where the plea was taken under a reasonable misconception of the consequence that would flow.

One of the issues raised by this application is whether or not the Petitioner should have been permitted to withdraw its plea of guilty because it did not envision when the plea was entered the extreme economic consequence that it would lose its automobile franchise. The Petitioner at the time it took the plea affirmatively believed that it would not lose its franchise. That belief was based on discussions that counsel for one of the other defendants had with a representative of General Motors. Because Petitioner was not permitted to withdraw the plea, it is unjustly and irreparably harmed, and it

may be unable to comply with the terms of the plea agreement previously signed.

One starts off with the general rule that a guilty plea does not satisfy the constitutional requirement of being valid and knowing if it is made without a full understanding of the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); Kercheval v. United States, 274 U.S. 220 (1927). Courts have recognized that doctrine, that in order for a defendant to waive many of the rights he possesses, including the right to trial by jury, the waiver must be an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458 (1938); Gates v. United States, 515 F.2d 73 (7th Cir. 1975); Bye v. United States, 435 F.2d 177 (2d Cir. 1970).

There is no question that the Petitioner, when it entered its plea, fully believed that it would retain its Buick franchise, hence it

would be able to maintain its income and pay the fine according to the written plea agreement. This belief was reasonable and was based upon months of discussions with counsel for the officials of General Motors and Buick. It was not until Friday, January 13, 1989, that the Petitioner was advised that upon sentence it would lost its franchise. Thus, the reliance, although not based upon statements of the Government or the Court, was still a genuine reliance, and there have been cases where misplaced reliance was not the product of action by the Court or the prosecutor, but nevertheless when it was, reasonable relief was obtained. United States v. Gonzalez, 820 F.2d 575 (2d Cir. 1987) (Misplaced reliance by a defendant upon misunderstood representations of counsel recognized by the Court of Appeals as being a real possibility and conviction reversed.).

The courts have recognized that the standard for determining the validity of a guilty

plea is whether the plea represents a valid and intelligent choice among the alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970); United States v. Teller, 762 F.2d 569, 575 (7th Cir. 1985). There is no doubt that when Mid-County Motors, Inc. took this plea it was not aware that it would lose its franchise when the plea was entered. It should be recognized that at the time of the taking of the plea the Petitioner indicated that even if an illegal agreement had been in existence, it was not implemented and the public suffered no economic harm. Thus, to make the Petitioner suffer extreme and irreparable harm so to jeopardize the business itself and perhaps prevent it from complying with the payments it would be required to make under the plea agreement, would represent a situation we believe to be unjust and extreme. We believe that even though the economic consequence of the plea was not based on improper

representations made by the Government or the Court, still the situation was so extreme that the Court should conclude that the Petitioner was unaware of what the consequence would be when the plea was entered, and fairness dictates that it should be permitted to withdraw the plea.

Generally speaking, courts have determined that the rule that is usually followed in most every Circuit in this country is that a defendant should be permitted to withdraw a guilty plea prior to sentence, although he has no absolute right to do so. In other words, the motion to withdraw should be liberally construed. Certainly, that is the law in the Second Circuit. United States v. Figueroa, 757 F.2d 466, cert. denied, 474 U.S. 840 (2d Cir. 1985); United States v. Burnett, 671 F. 2d 709 (2d Cir. 1982); United States v. Gonzalez, supra; United States v. Read, 534 F.2d 858 (9th Cir. 1977). The rule has evolved to the point that courts have held

that to succeed on such a motion valid grounds should exist so that the withdrawal of the plea is "fair and just", if the motion is made prior to sentence and the motion is addressed to the broad discretion of the trial court. United States v. Saft, 558 F.2d 1073 (2d Cir. 1977). On the other hand, when the motion is made after sentence it should only be allowed to prevent manifest injustice. Barker v. United States, 579 F.2d 1219 (10th Cir. 1978); United States v. Bradin, 535 F.2d 1039 (9th Cir. 1976); United States v. Carden, 599 F.2d 1320, cert. denied, 444 U.S. 874 (4th Cir. 1979).

In determining whether or not to allow the Petitioner to withdraw its plea and in order to impel a court to exercise its discretion, a three prong test has been relied upon. Thus, in United States v. Russell, 686 F.2d 35 (D. C. Cir. 1982) and United States v. Campbell, 778 F.2d 764 (11th Cir. 1985), there was a recognition that the practice of allowing the withdrawal of pleas before sentence is liberal,

and it would seem from a reading of these cases that unless there was extreme prejudice to the Government, as long as the motion gave a believable and reasonable basis for withdrawal of the plea, the motion should have been granted. In addition, in United States v. Roberts, 570 F.2d 989 (Appealed after remand), 600 F. 2d 815, aff'd. 445 U.S. 552 (D.C. Cir. 1977), it was believed that a defendant should generally have the right to withdraw his plea if his motion was made on the basis of a misunderstanding, as long as the misunderstanding was significant, and in United States v. Russell, supra, the court reversed the trial court's refusal to allow the defendant to take back his plea because he did not realize deportation proceedings based upon the conviction would result. Thus, it is not an absolute requirement that the consequence be direct or the result of misrepresentations by the Government, but in cases where the con-

sequences of the plea are extremely significant, courts have apparently felt that it was fair and just not to saddle the defendant with something he did not foresee and allow him to proceed to trial. In this regard, United States v. Crowley, 529 F.2d 1066, 1072, cert. denied, 425 U.S. 995 (3rd Cir. 1976), is instructive. In that case, after recognizing the general rules dealing with motions to withdraw pleas, the court refused to allow a defendant to withdraw his plea where as a result of the conviction he lost his job as a fireman, that obviously being an economic result of the plea and conviction. In that case, the Court pointed out that since the defendant knew he might be imprisoned for ten years, he must have known he might lose the right to his job as a fireman by the end of that period. The conclusion is inescapable that the court in making its decision rested in part on its feeling that the defendant had to know what the consequence

would be, and if there was a believable reason why he would not have obtained such knowledge, the result might have been different. In the case at bar, Mid-County Motors, Inc. was told and led to believe it would not lose its franchise, and it was only after the taking of the plea that Buick advised it that that would not be the case. Thus, there is no rational basis upon which the Petitioner could have concluded its franchise would be lost when it entered the plea on November 7, 1988. The hardship produced by the plea and sentence is so extreme that it may be said the punishment far exceeds that which would fit the crime.

When the pleas of guilty were entered the defendants specifically indicated that while there may have been an agreement, the public suffered no economic harm, in that any such agreement was never implemented. In the case of Mid-County Motors, Inc., the sole stockholder and President of the corporation not only did not agree to enter into any such

agreement, but also had no knowledge of any such illegal agreement, if there was one. Based on the discovery provided pre-trial, the basis for Petitioner's plea was that the sales manager of another dealership had advised the Government that a sales manager of Mid-County Motors, Inc. told Petitioner's counsel that he did not intend to agree to the scheme alleged by the Government. Permitting the Petitioner's plea of guilty to stand will cause it to lose its franchise, thereby putting it out of business. We do not believe that such extreme harm is a desirable result from the point of view of the Petitioner, its fifty or more employees, or even the public in general, and the court below should have granted Petitioner's motion.

In United States v. Herman, 443 F.Supp. 625 (S.D.N.Y. 1977), the court denied a presentence motion of an attorney to withdraw his plea. Although the motion was denied,

the case is particularly instructive because there was overwhelming proof that the attorney had submitted false letters to the S.E.C. in connection with a stock fraud swindle, and that he knew the letters to be false when he submitted them. When the plea was taken the law was such that a plea of guilty did not automatically disbar an attorney, but by the time the sentence came around, New York State had changed its law, in that the Court of Appeals decided that a conviction did cause automatic disbarment. The Court pointed out not only that there was overwhelming proof against the attorney, but that the federal court specifically told the attorney at the time of the plea that in the federal judge's experience the conviction may automatically result in the lawyer's disbarment. United States v. Herman, supra, at 627. The Circuit Court noted that the defendant-attorney and his attorney stood mute and took no exception nor did either of them make any comment to

Judge Cooper's statement. Thus, at the time of the plea the only indications in the record were that the defendant faced the probable loss of his license to practice law. That situation is very close to the Crowley case, which we have previously referred to, involving the loss by the defendant of his job as a fireman. Thus, in Crowley, the court specifically pointed out that based upon the record of that case there was a strong probability that the defendant knew he would lose his job because he was facing a lengthy jail sentence. Obviously, if you are in jail you cannot be outside working at the same time, and the only fair inferences from the record in both cases are that the defendant knew of and expected the serious economic consequences that followed. However, it is just the opposite in this case. The facts would be much closer to Crowley or Herman had General Motors or Buick told

Petitioner it would probably lose its franchise. Thus, if Judge Cooper had told the defendant, Herman, that he probably would not be disbarred or if the court in Crowley had told the defendant specifically that he probably would not lose his job as a fireman, the result would have been different. In this case, petitioner's realistic expectation was it would not lose its franchise. That expectation was based upon reasonable factors and conversations that one of the attorneys had on behalf of all of the defendants with counsel for General Motors.

In United States v. Casanova's, Inc., 350 F.Supp. 381 (E.D. Wis. 1972), the revocation of a firearm license was involved and although the motion could have been denied because it was made after sentence, the law was that revocation was automatic. So the principle surfaced that a defendant is normally charged with knowledge of the law generally, and that knowledge would include an automatic

revocation of a license that flows from a conviction. But in our case, termination of the Petitioner's franchise was not automatic and, in fact, the franchise agreement provides that General Motors "may" terminate the franchise, so that termination could not have been anticipated. In fact, in view of all the indications that Petitioner had, the signs pointed to a non-termination.

There had been years of negotiations in this case by defense counsel with the Government, both prior to and after the indictment. Defense counsel was told it had to go to trial on a conspiracy case and certain joint defense projects were undertaken which, of course, was common knowledge to both sides. In the normal manner of dividing the work it is not unreasonable that one of the law firms involved undertook to have negotiations with General Motors in order to ascertain what its position would be as a result of a plea of guilty. There

was no reason and no need for all of the lawyers to be present, and while General Motors did not indicate its feelings in writing, there was no expectation that General Motors should have tied its hands before all the facts became known. The point is, the indications were that there would be no automatic termination, and that information was disseminated to all of the defendants and their attorneys. It was entirely reasonable for the Petitioner in this case, based upon these indications and the standing it knew it had with Buick, to take the plea with the reasonable expectation that the only harm that would come to it was the payment of the agreed upon fine. After all, as we pointed out before, the franchise was not in the Petitioner's name but in the name of its sole stockholder and President, E. Stephen Malise, who had become the owner of the business when his father, who had started the business, passed away.

He was not shown to have known anything about the fraudulent scheme, there was no evidence that he authorized it or condoned it and, in fact, he submitted an affidavit of his own and through his attorney that he had no knowledge whatsoever that the scheme had occurred. Mr. Malise was not indicted and was not even named as an unindicted co-conspirator by the Government. His company had received many awards for sales and for customer relations, had employed approximately fifty people in an economically depressed area in Brooklyn, and it would seem that there was little reason that the Government would have to do things which would further depress the area or injure people unnecessarily once it had obtained the fine it was seeking and the conviction it desired. Even the sales manager, who supposedly was present at meetings on behalf of Mid-County Motors, Inc., told counsel that he had not intended to agree to an illegal scheme.

We appreciate the fact that the misunderstanding on the part of Mid-County Motors, Inc. was not the fault of the Government or the Court, yet it is so significant economically that it has far greater impact than even a prison sentence standing alone, where the prison sentence did not result in the loss of the franchise. The court below stated that it did not see a fair and just reason to allow Petitioner to withdraw the plea, but we believe the court was wrong. There was no great prejudice to the Government, because it would simply have to engage in a trial against one defendant where it previously had four others, and if anything, the trial would have proceeded more expeditiously. In addition, the Government put years into this case and much manpower, and it would seem that the mere act of taking the plea, which really did not cause much to happen except for the entry of the plea itself, should not blindly prohibit Petitioner from realizing it had made a mis-

take, and a mistake which was not made out of ignorance or negligence, but one which was based upon a reasonable expectation of what would have happened.

We also recognize that the law is that although the principal corporate officer and sole stockholder may not have known of an agreement, the corporation still might not have the defense of ultra vires available to it. Yet the law is also clear that under certain circumstances the defense would be available, and this case may be one of those situations where it applies. For example, generally in the State of New York a corporation is criminally liable for the acts of its agents, which in this case would have included the sales manager, where he acts within the scope of his employment and also acts on behalf of the corporation. New York Penal Law, Section 20.20 (2)(b). That doctrine has been generally recognized in the

federal courts. United States v. DeMauro, 581 F.2d 50 (2d Cir. 1978); United States v. Gold, 743 F.2d 700, cert. denied, 459 U.S. 1217 (11th Cir. 1984). Thus, the rule is that the agent must not only act within the scope of his authority but must be acting to benefit the corporation as well as himself. Conversely, it has been held that even where the agent acted within the scope of his authority but acted adversely to the interests of the corporation, his knowledge would not be imputed to the corporation. American Standard Credit, Inc. v. Natural Cement Co., 643 F.2d 248 (11th Cir. 1981); In re Investors Funding Corp. of New York v. Securities Litigation, 523 F.Supp. 533, reh. denied, 576 F.Supp. 1350, reargument denied, 36 B.R. 1019 (D.C.N.Y. 1980); Meredith v. Camp Hill Estates, Inc., 77 A.D. 2d 649 (N.Y. App.Div. 1980); O'Connor Associates v. Dean Witter Reynolds, Inc.,

529 F.Supp. 1179 (D.C.N.Y. 1981). We believe that the facts if they are developed at a trial would raise a question of fact for the jury on this issue, as well as a question of fact as to whether any sales manager for Mid-County Motors, Inc. ever intended to enter into any alleged illegal agreement as contended by the Government. Thus, as this Court can see, based upon the fact that the sales manager would testify that he did not intend to bind Petitioner to an illegal agreement, the fact that the sole stockholder and President of Petitioner knew nothing about this situation, and the fact that he stated to the court below in an affidavit that prices were fixed based upon economic considerations , such as overhead, insurance and other items should have impelled the District Court to have granted Petitioner's motion to withdraw its plea.

CONCLUSION

THE PETITION FOR CERTIORARI
SHOULD BE GRANTED.

Respectfully submitted,

STANLEY M. MEYER, ESQ.
Attorney for Petitioner,
MID-COUNTY MOTORS, INC.
150 Broadway - Suite 1212
New York, New York 10038

DePETRIS & MEYER, ESQS.
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the fourteenth day of November, one thousand nine hundred and eighty-nine.

Present:

Hon. James L. Oakes
Chief Judge.
Hon. Amalya L. Kearse,
Hon. Frank X. Altimari,
Circuit Judges

United States of America,
Appellee,
v.
Mid-County Motors, Inc.,
Appellant.

89-1271

O R D E R

Mid-County Motors, Inc. ("Mid-County") appeals from a ruling of the United States District Court for the Eastern District of New York, Charles P. Sifton, Judge, refusing to allow it to withdraw its guilty plea to a charge of fixing prices in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1 (1982). We affirm

Mid-County, a Brooklyn Buick dealership, was indicted on January 5, 1988, along with

three other corporate defendants and one individual defendant, for violating Section 1 of the Sherman Act. On November 4, 1988, the four corporate defendants entered into a plea agreement with the Government. Pursuant to that agreement, the corporate defendants pled guilty to the indictment on November 7, 1988. In exchange, the Government recommended dismissal with prejudice of the charge against the individual defendant, Lester Potter, and agreed not to bring charges against various individuals associated with the corporate defendants.

Before sentencing, Mid-County, sought to withdraw its plea pursuant to Fed. R. Crim. P. 32(d), asserting as grounds for withdrawal a January 13, 1989, communication from General Motors ("GM) informing Mid-County that, upon the district court's acceptance of the plea agreement and subsequent sentencing, GM was going to terminate Mid-County's Buick franchise. The GM dealer

agreement contained a provision allowing it to terminate franchises of dealers convicted of felonies. According to Mid-County, the lawyer of another defendant had contacted a GM official prior to accepting the plea agreement, and the GM official had reported that the company had no automatic policy of terminating dealer franchises in instances of felony convictions. Mid-County mistakingly took this to mean that it could plead guilty and retain its franchise. Once it discovered otherwise, Mid-County argued that the unforeseen and harsh consequences it would fact if not allowed to withdraw its guilty plea justified its request.

The district court denied both the motion to withdraw and the motion for reconsideration. It then sentenced Mid-County to $380,000 in fines, payable over a four year period.

Fed. R. Crim. P 32(d) allows a district

court to permit withdrawal of a guilty plea prior to sentencing "upon a showing by the defendant of any fair and just reason." District courts, however, have wide discretion in deciding whether to accept plea withdrawals, see, e.g., United States v. Sweeney, 878 F.2d 68, 70 (2d Cir. 1989); United States v. Figueroa, 757 F.2d 466, 475 (2d Cir.), cert. denied, 474 U.S. 840 (1985); United States v. Michaelson, 552 F. 2d 472, 475 (2d Cir. 1977), and an appellate court will reverse a refusal to permit a Rule 32(d) withdrawal only if the district court has committed clear error. See Michaelson, 552 F.2d at 475.

We find that the district court did not improperly decline Mid-County's Rule 32(d) request. Although district courts ordinarily permit withdrawal of a plea induced by fraud, mistake, coercion, or misrepresentation, see 3 C. Wright, Federal Practice and Procedure Section 557, at 190 (2d ed. 1982), Mid-County cannot claim any of these factors are present.

Before accepting the plea, the district court extensively questioned the trial attorneys, including Mid-County's, to ensure the agreement was entered into knowingly and voluntarily. All parties admitted to violating the statute. Accordingly, there is no basis to conclude that Mid-County pled guilty without full appreciation of its constitutional rights or upon a mistaken belief of guilt.

The lack of a genuine claim of innocence further detracts from Mid-County's argument for withdrawing its plea. See United States v. Crowley, 529 F.2d 1055, 1072 (3d Cir. 1976), cert. denied, 425 U.S. 995 (1976); see also Figueroa , 757 F.2d at 475 (noting defendant's failure to make genuine claim of innocence when affirming trial court's refusal to permit withdrawal of guilty plea). Although Mid-County's president and sole stockholder, E. Stephen Malise, now claims that he knew nothing of the price-fixing scheme, his professed innocence is irrelevant, because

he is not the defendant in this case. The actual defendant, Mid-County, vaguely intimates that at trial it might be able to distance itself from the wrongs of its principals; however, it fails to flesh out a palpable claim of innocence.

Essentially, Mid-County's claim for withdrawal of the plea springs from consequences collateral to the plea -- GM's notice that it intended to terminate Mid-County's franchise. Mid-County does not claim that it did not know that GM policy allowed removal of a franchise when a dealer is convicted of a felony. Rather, on the basis of undocumented conversations between a GM official and counsel for another party, Mid-County took an ill-advised gamble that GM would not exercise its right of termination. Cf. Figueroa, 757 F.2d at 475 (defendant's change of heart prompted by reevaluation of his case not sufficient to justify reversal).

We find it unnecessary to outline when

onerous collateral consequences might justify allowing withdrawal of a guilty plea pursuant to Rule 32(d). As pertains to this case, however, it suffices to note that when a defendant enters a guilty plea based upon a poorly calculated hunch, we find no error in a district court's denial of the defendant's Rule 32(d) motion made after that hunch turns sour.

Judgment affirmed.

James L. Oakes,
Chief Judge

Amalya L. Kearse

Frank X. Altimari,
Circuit Judges